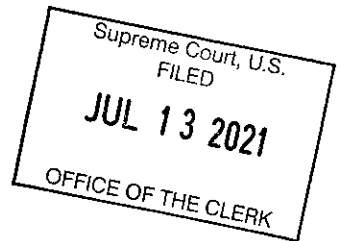


21-5170

No.

ORIGINAL



IN THE
SUPREME COURT OF THE UNITED STATES

PATRICIA A. MCCOLM, *Petitioner,*

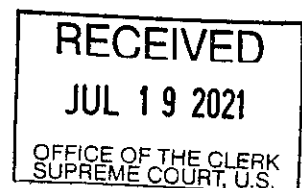
v.

STATE OF CALIFORNIA et. al., *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ON PETITION FOR WRIT OF CERTIORARI

PATRICIA A. MCCOLM
P.O. Box 113
Lewiston, California 96052
(415) 333-8000



QUESTIONS PRESENTED

1. Did the Ninth Circuit err in *not* finding an appropriate issue for appeal, where the magistrate judge failed to find that medically verified permanent limitations of disability preventing timely compliance with court processes are “*exceptional circumstances*” for appointment of counsel; where the magistrate judge **recommended dismissal with prejudice by reason that appointment of counsel was denied and where had appointment been granted, leave to amend would have issued.** (See Appendix F) **If merit is found for leave to amend by able-bodied counsel, then merit should also be found for leave to amend for pro se plaintiffs with disability.** Dismissal with prejudice should not have issued. Thus, appeal is warranted where there is an apparent failure to comply with 28 U.S.C.1915 and appearance of discriminatory bias against pro se plaintiff’s with disability.

2. Should the Ninth Circuit have decided the motion for appointment of counsel timely filed by petitioner with severe acute medical conditions and permanent limitations of disability **seeking assistance with the pre-filing process** and appeal, *prior* to issue of an Order dismissing the appeal for allegedly stating “*insubstantial*” issues on appeal; in particular, because consideration of said motion may have changed the outcome of the case.

3. Whether a review of petitioner’s submission of district court orders on appeal and statement of facts or law which are relied upon for purposes of the appeal are in good faith, “merit further review,” and should have been filed pursuant to 28 U.S.C. 1915.

4. Did the Ninth Circuit err in alleging pursuant to a 20 year old pre-filing order, that the issues on appeal are “*insubstantial*” denying further review; thereby, wrongfully sustaining a dismissal with prejudice without leave to amend, where the facts/law on the merits of any cause in the Second Amended Complaint were NOT considered, where petitioner’s motion for appointment of counsel to accommodate limitations of disability for timely compliance with medically impossible demands of the court was denied, where the second amended complaint stated facts and authority upon which a claim for relief could be granted and/or amended to state a claim was denied and where a dismissal with prejudice without leave to amend was not proper pursuant to 28 U.S.C. 1915.

5. To avoid erroneous deprivation of constitutional rights, including right of access to the court; should this Court determine that pro se plaintiff’s with severe limitations of disability and/or stigma of self representation prejudicing compliance with court processes, receive accommodations appropriate to his/her limitations of disability and/or appointment of counsel to assist in addressing the demands of court processes rather than suffer a dismissal with prejudice to avoid such accommodations/leave to amend and/or to avoid indicia of discriminatory bias.

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TO APPOINT COUNSEL, TO FAILURE TO RULE ON OR CONSIDER
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TO VACATE REFERRAL FOR GOOD CAUSE/EXTRAORDINARY
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APPENDIX F: **ORDER DENYING RENEWED MOTION TO APPOINT COUNSEL.**

APPENDIX G: **NOTICE OF APPEAL TO THE UNITED STATES COURT OF
APPEAL, NINTH CIRCUIT; WITH *REQUEST FOR APPOINTMENT
OF COUNSEL, PERMISSION & APPEAL.*** (Presented without
redundant exhibits above and others by request for Judicial Notice.)

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

~~ORDER~~
The ~~opinion~~ of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

~~ORDER~~
The ~~opinion~~ of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was FEBRUARY 17, 2021.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including JULY 17, 2021 (date) on March 19, 2021 (date) in Application No. A General Order 589 U.S.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I

United States Constitution, Amendment XIV

28 U.S.C. 1915

Americans With Disability Act (ADA)

P.L. 101-336, 104 Stat. 327 (1990), 42 USC sec. 12101 et sec

STATEMENT OF THE CASE

Factual Background of Civil Rights Complaint:

In 2012, petitioner filed a civil rights case against Trinity County and related defendants (2:12-cv1984) after receiving a right to sue from the California Department of Fair Employment and Housing; pleading knowing violations of constitutional rights, including retaliatory criminal charges. On information and belief, defendants believed a prison sentence would create a defense that would prejudice any judge or juror who would hear the case and would result in foreclosure of petitioner's residence; thus, forcing her out of Trinity County.

A girlfriend of a Trinity judge employed as an associate clerk of the court, accused petitioner of filing false proof of service because petitioner's address was on the proof of service instead of the address of the person serving; which questionably resulted in a prison sentence out of which the underlying action in this matter arises; even though, petitioner had at no time been arrested for any prior criminal offense, all documents were received by the person to be served

and no financial or prejudicial harm occurred for anyone. The sheriff deputy taking petitioner to prison told her that the reason she was going to prison was because she *"Pissed off a lot of people by filing the civil rights complaint revealing the judge's affair with the court clerk."*

Instant petition for writ of certiorari (20-16817) relates to the civil rights offenses arising out of the prison term questionably imposed in essentially undefended retaliatory charges filed against petitioner. Even though the trial judge anticipated "probation," and stayed the prison term he had not been aware of under P.C. 115; Trinity County defendants orchestrated a DIFFERENT lack of jurisdiction judge to wrongfully remand petitioner to prison without allowing any preparation by petitioner for same. Petitioner arrived at an inappropriate high level prison, where she was housed with multiple inmates who had committed murder and who targeted the objected to *"stinkin old person"* for abuse. The officers disregarded petitioners pleas for a physician prescribed wheelchair and other ADA accommodations; as well as, for protection from the repeated battery being inflicted, which resulted in severe harm as set forth in the complaint. The failure to afford accommodations of disability resulted in severe medical harm as set forth in the complaint.

To be timely, the initial complaint was drafted in prison under extreme conditions of abuse such as being repeatedly pelted with hurtful and disgusting objects with water being thrown on her typewriter and papers. It also had to be drafted without the help of a law library, in that no such was made available timely and/or was prevented by officers. Importantly, the alleged law library did not contain civil law information, forms and authority relevant to the causes of action in the complaint. Legal mail for relief to the California Supreme Court was subverted and never was received by the court, which in and of itself is a viable cause of action.

Upon return to Trinity County, petitioner was faced with horrific circumstances where her house was essentially destroyed, computer stolen, there was no electricity and no money to pay for utilities, food or any other essential necessities of life. Further, petitioner was faced with amendment of the complaint where her health was very bad and need for surgery urgent. Petitioner was also faced with near immediate trial as a defendant in a frivolous case brought by PG&E to force imposition of power poles on her real property without an easement; where such was claimed under false pretenses and proven at trial not to exist, a fact known to PG&E prior to filing its lawsuit. When petitioner asked PG&E to respect her property ownership rights, the corporate attorney stated: *"You have no rights, you are a vexatious litigant."*

Petitioner respectfully requests this Court act within all of its authority to overcome such prejudicial stigma assumed to give permission to commit any wrong against such persons as occurred in this case. The appeal in this matter should proceed to clarify that even those with such regrettable stigma, still have constitutional rights and protections under the law; as petitioner is attempting to exercise here.

The facts and authority relied upon for the complaints properly present the facts for the causes of action stated. Had the case proceeded, the complaint could have been augmented through discovery. Although the case was essentially one under the ADA, the District Court erred in its focus on 42 U.S.C. 1983 for its dismissals and demands to amend, which the judge issuing admitted was wrong and reversed; yet, later assigned magistrate judges questionably repeated the errors focusing on 1983 to precipitate the desired dismissal with prejudice, where the alleged failure to comply with a court order was reversed.

Procedural Background and Good Faith Cause to Appeal:

Petitioner is limited in time and ability to start over with new argument for statement of the case; and thus, does request judicial notice of the argument presented in her Objections to Magistrate Judge's Findings and Recommendations, Appendix E(2) and in the Notice of Appeal, Appendix G page 6-20 includes Statement of Facts and Law on Appeal as follows:

"...Plaintiff has neither been able to fully recover from on-going effects of auto-immune *Hashimoto's Disease*, nor the severely disabling continuing painful effects from traumatic injuries in 2019-20; or even begin to recover, from the overwhelming continuing prejudicial impact from the false and defamatory media comment and "stigma" arising therefrom, that appears to wrongfully govern decisions made by others painful to plaintiff, in all walks of life; decisions based on false assumptions from some 20 years ago; which has further effectuated a denial of Constitutional remedy by reason of medical impossibility; and which appears to have influenced the outcome in this case.

In addition, even the retired presiding judge of the Eastern District Court has publically recognized that with the judge shortage, that the guillotine of prejudice is more likely than not to fall on pro se litigants. A due process violation? Does any court still care about Constitutional protections providing a remedy, where time consuming persons with disability are involved? It is not unreasonable to assume from the history of this case, that pro se plaintiffs with disability; in particular, those that have been stigmatized as "vexatious" because of misunderstood disability and/or through denial of appropriate accommodation thereof, are the most likely to be denied access to the court to resolve grievances under the present circumstances. Thus, it appears such individuals, like plaintiff, are subject to a preconceived opinion against merit exercised without

an actual reading of any claim or taking the time to understand / determine the good cause and harm upon which the claim for relief is based. Must plaintiff's with disability suffer extreme harm from defendants without a remedy? Where is *that* in the law or good conscience?

This 74 year old, coping with age related decline; as well as, a refusal to heal serious painful swollen leg laceration injury and related newly diagnosed serious back injury requiring urgent surgery to avoid likely paralysis; has also to cope with a second debilitating disability from a second auto-immune diagnosis of Multiple Sclerosis; for which after FOUR YEARS of extreme time required effort to enforce a California Administrative Law Judge order, a power wheelchair has finally been provided by the MediCal insurer. It is likely M.S. was also *not* diagnosed in the 1990s. Thus, there is progressive cognitive decline, continued interference with ability to accomplish daily activities of life; as well as, impossible court expectations; in particular, where sufficient time is not afforded for a good faith effort to overcome pain, confusion, lack of concentration/focus, memory loss of instant recall, words and much past learning, inability to be organized and focus being verbose and unable to "edit" effectively; all indicative of the progressive disease with declining cognitive and physical functioning; with inability to cope with the "shut-down" distress at being the subject of targeted abuse and deprivation of civil rights as occurred in the action at hand.

Plaintiff prays for relief from stigma and the guillotine and a fair opportunity to prevail; in particular, through appointment of counsel.

JUDICIAL NOTICE is respectfully requested of verification of medical conditions / limitations of disability and recommendation for appointment of counsel; as set forth by

plaintiff's physicians under seal; in particular, medical statement of Michelle L. Apperson, M.D, PhD dated August 23, 2018, in this action showing that plaintiff's failings are not "willful;" but attendant to medical problems. The documents under seal give sufficient showing to vacate dismissal and appoint counsel; as well as, recent additional statement of acute diagnosis in support of application to appoint counsel for assistance with the herein permission and appeal process; in particular, in light of recent back injury diagnosis and recommended surgery to avoid potential for paralysis. Attached are two medical statements in support of application for appointment of counsel as EXHIBITS 11 and EXHIBIT 12, that will be with the application submitted directly to the Court of Appeal, along with Form 24 showing additional good cause therein.

Instant case should have been allowed amendment and appointment of counsel. Absent permission to appeal and determination of this case in the District Court; the prejudicial knowing denial of constitutional and civil rights by State prison employees, more likely than not, will continue; in violation of constitutional protections and statutory rights of persons with disability; in particular, with a "green light" to allow unrestrained physical battery by other prisoners and custodian officers alike. Plaintiff's suffering a broken nose and repeated multiple injury from prisoner battery as set forth in the SAC; as well as, extreme pain and falls suffered from failure to provide plaintiff with the physician prescribed wheelchair; one fall which required shoulder surgery, should not be tolerated by prison officials against any prisoner and such violation of law should not be condoned by this Court for any procedural deficit alleged.

Elder persons with disability are the most vulnerable and should receive enhanced protections; not denied the very accommodations and durable equipment required to avoid pain from effects of disability; as occurred in this case and then made to suffer false disciplinary charges and unlawfully denied legal mail to the Supreme Court of California in retaliation for her complaints. For this plaintiff, a dismissal with prejudice is a COMPLETE DENIAL OF CONSTITUTIONAL RIGHT OF ACCESS TO THE COURT TO RESOLVE GRIEVANCES; merely, by reason of misunderstood time requirements to accomplish any written project in such a manner as to have a fair and equal opportunity with able bodied persons to achieve a favorable result and/or to not accommodated limitations of disability causing dismissal with prejudice and/or by reason of bias from "stigma" related to this plaintiff with disability.

STATE PRISON EMPLOYEES ARE NOT IMMUNE FROM LIABILITY FOR KNOWING VIOLATIONS OF A PERSON'S CONSTITUTIONAL RIGHTS as occurred in this case. STATE ENTITIES INCLUDING PRISONS ARE NOT IMMUNE FROM LIABILITY FOR VIOLATIONS OF THE ADA AS OCCURRED IN THIS CASE. Thus, to dismiss this case with prejudice with implication that it is "frivolous" for wrongfully alleging failure to state a cause of action or other questionable non-accommodating reason, is just plain wrong! It gives the strong appearance that the magistrate judge and/or staff just didn't want to read a lengthy complaint by a stigmatized plaintiff, is biased and unable to provide a fair and impartial evaluation of the action and/or that the District Court is trying to reduce its case load by keeping disabled plaintiffs out of court without regard to the merit of *any* cause of action.

The hard working legal assistant(s) need to help the Court by actually READING THE SECOND AMENDED COMPLAINT in relation to attorney practice manuals it tracks meeting

the elements for each cause of action; as well as, the multiple pages of substantial FACT supporting the causes of action; where defendants knowingly acted in concert per retaliatory agreement to prejudice and cause physical pain/injury and emotional harm to plaintiff, a stigmatized person with disability! Intentional failure to provide physician prescribed wheelchair with pusher to move same and avoid pain/injury, is blatant intentional discrimination and retaliation actionable under the ADA; as well as, is officer and multiple prisoner battery with injury including a broken nose. Retaliatory false disciplinary charges and denial of due process at hearing for objecting to denial of access and accommodation is actionable; and even a violation of U.S.C section 1983; where the citation showing such to be a violation in the prison context, was apparently disregarded by the magistrate judge. The District Court's primary reliance on U.S.C. section 1983 to determine dismissal expecting amendments thereto without regard to viability under the ADA is wrong; as is the repetitive error in using said statute to prejudice plaintiff in contravention of the ADA; upon which she should prevail, on the same facts as drafted in the SAC.

Appeal is proper to correct the magistrate judge in this case, who acted against law from his erroneous belief that if counsel is not warranted, the case will be dismissed. (See Exhibit 4, page 2, lines 18-19) Plaintiff has found NO AUTHORITY and no such was cited by the magistrate judge, that allows a District Court to dismiss an action because counsel is not appointed. And to do so WITH PREJUDICE!

Such judicial conduct shows discriminatory bias against persons with disability to proceed pro se and was good cause to withdraw the referral. The Second Amended Complaint fully states at

least one cause of action, which under 28 U.S.C. 1915 should not have been dismissed with prejudice.

THIS COURTS NEEDS TO ENSURE THAT EFFECTS OF ILLNESS AND LIMITATIONS OF PERMANENT AND ACUTE DISABILITY DO NOT BECOME THE MEASURE OF DENYING ACCESS TO THE COURT AND DUE PROCESS IN THIS COUNTRY; as occurred for plaintiff in this action. Plaintiff's physicians have stated that the inability to meet court time and other expectations is not willful; but a problem related to her medical condition and that counsel should be appointed (See Medical Statements under Seal; in particular, that of Dr. Apperson dated 8/23/18 and the most recent submission, Exhibit 12; in support of request for appointment of counsel on request for permission and appeal). This Court needs to tell District Courts, that failure to appoint counsel, is NOT a proper reason to dismiss an action with prejudice.

The statements of fact and law set forth above and as set forth in each of plaintiff's objections and motions filed in this case; as well as, medical good cause set forth in documents under seal are incorporated by reference into the Statement of Facts and Law on Appeal set forth below:

STATEMENT OF FACTS AND LAW ON APPEAL

ABUSE OF DISCRETION / ERROR OF LAW: DENIAL OF LEAVE TO AMEND AND

DISMISSAL WITH PREJUDICE BASED ON UNFOUNDED FACTS/AUTHORITY RE
"FAILURE TO STATE A CLAIM" UNDER 28 U.S.C. SECTION 1915;
CONSTITUTIONAL VIOLATION / DENIAL OF ACCESS TO COURT / MANIFEST
INJUSTICE RE APPEARANCE OF DISCRIMINATORY BIAS AGAINST PRO SE
PLAINTIFFS WITH DISABILITY AND/OR VEXATIOUS LITIGANT "STIGMA" IN
CASE WITH MERITORIOUS FACTS/CAUSE(S) OF ACTION; AND, DENIAL OF
MOTION TO APPOINTMENT COUNSEL.

The **SECOND AMENDED COMPLAINT (SAC)** (ECF) in this substantial in forma pauperis ADA/civil rights action was denied leave to amend and **DISMISSED WITH PREJUDICE** (ECF) and Judgment (ECF) entered thereon , 2019 for **"FAILURE TO STATE A CLAIM et al;"** at the screening stage under 28 U.S.C. 1915; in what appears to be abuse of discretion and error of law through prejudicial disregard of authority under said statute and in contravention of substantial pages of FACT supported by available documentary evidence; INCORPORATED INTO THE COMPLAINT as authorized by law, regarding each defendant relating directly to each of the causes of action set forth in the SAC upon which the action is based; which clearly show that the facts stated constitute good cause to amend and constitute at least *one* cause of action that would work against a dismissal of the action; in particular, "with prejudice."

The facts within each cause of action identifies with particularity the defendant(s) to which each applies. The facts and causes show acts by defendants in concert/agreement to knowingly violate plaintiff's constitutional and civil rights in retaliation for plaintiff's protected

conduct; in particular, requests for accommodation of disability, the noticed right to use a physician prescribed wheelchair with pusher, to be free from harm from custodial officers and other prisoners and to file legal documents, subverted in this case.

A full and complete reading of the SAC tends to indicate that the magistrate judge findings and recommendations are not based on actual fact and authority; but appear to be based on ire related to plaintiff's request to vacate the referral (The District Judge failed to rule on the request to vacate the referral.) and/or discriminatory bias against pro se plaintiffs with disability and/or vexatious litigant "stigma" from over 20 years ago, related to this particular plaintiff with an apparent agenda by the magistrate judge designed to keep said class of persons and/or plaintiff out of the District Court; as would tend to be indicated by an apparent failure to actually read the entire complaint and/or misconstruing "cherry-picked" sentences attributed to only one cause of action, Section 1983, to questionably precipitate the dismissal without regard to contra authority under the ADA. Even the causes under 1983 are not correctly identified on the facts and grounds upon which the statute is applied. Remarkably, the magistrate judge makes reference to Section 1983 comments regarding the original complaint, which are not applicable to the SAC; in particular, as the SAC clearly shows the reference is to only to Section 1983 for the "linkage" argument without regard to the fact that the comments were essentially erroneous in other parts by reason of failure to apply the law under the ADA. Thus, even the one claim out of which each defendant arises is satisfied; in particular, as related to "series of transactions or occurrences" and there is an ADA retaliation and constitutional "question of law or fact common to all defendants."

As set forth in the SAC under Jurisdiction, the SAC states: "Plaintiff brings this action

under the American's with Disability Act, 42 U.S.C. section 12101 (Prohibition against discrimination based on disability), 12203 (Prohibition against retaliation and coercion) et seq. ("ADA"), Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. section 794 for discrimination based on plaintiff's disabilities; 42 U.S.C. section 1981 (Reverse Discrimination), 42 U.S.C. section 1985 (Conspiracy to Interfere with Rights) 1988; 42 U.S.C. section 1986 (Neglect to Prevent Interference with Rights); (42 U.S.C. 1983, deprivation of civil rights, retaliatory infractions et al, conspiracy/denial of plaintiff's rights secured by the United States Constitution under the First, Fourteenth, Eighth Amendments, civil conspiracy, denial of access to the courts/destruction of legal mail/records, cruel punishment/failure to protect; and related State claims including but not limited to causes for violation of Penal Code sections 2650-2652 (failure to protect, unauthorized punishment, lack of care inflicting injury/impair health of prisoner), 2652/2656 (lack of care inflicting injury/deprivation of medically prescribed orthopedic appliances), California Civil Code sections 51, 51.7, 52.1 (discrimination/interference with exercise of civil rights) et al., Civil Conspiracy / Deprivation of Civil Rights, California Code of Regulations Title XV violations, medical negligence, personal injury/premises liability, personal injury/assault and battery, intentional/negligent injury/failure to protect from other inmates (violent injury/physical abuse, verbal harassment/bullying), retaliatory intimidation/treats to use "Ad Seg" to quell ADA complaints et al, sexual harassment/indecency, retaliatory infractions, fraud, intentional/negligent infliction of emotional distress, personal injury/infliction of sleep deprivation, intentional/negligent destruction/theft of personal property, intentional/negligent destruction of documents/evidence, defamation, elder abuse, intentional/negligent creation of false and defamatory documents, falsification/destruction of

medical records, failure to inspect/produce and correct per statute upon request, failure to provide access to courts re failure to effectuate legal mail, interference with legal and U.S. Mails et al." Conspiracy touches all above stated causes.

Essentially, NONE of the above causes were actually subject to analysis by the magistrate judge on the facts and authority related thereto and even the Section 1983 causes are not stated correctly by the Magistrate Judge on the actual facts and causes to which the statute applies; as a full reading of the SAC would show and raise a viable issue for adjudication such as cause of Action re Conspiracy to Interfere with Rights with specified Constitutional violations and retaliatory false charges & Fourth Amendment violations).

In instant appeal, the constitutional violations running to the merits of the civil rights complaint in this case, are not in issue; the District Court having made no factual/legal determination on the merits of any claim therein. No specific defendant was identified or stricken on ground of immunity. Under the ADA, defendants are arguably liable under the facts of this case. No specific cause was identified or stricken as lacking arguable merit. Based on attorney practice manuals and authorities expressing requirements re fact and law, plaintiff is informed and believes that the facts and law support each of the claims stated. And if there is a defect, that notice thereof from the Court with leave to amend should have been granted.

The denial of leave to amend and dismissal with prejudice appears to be more likely based on bias and/or limitations of disability; than any alleged "failure to state a claim." Ability to conform to expectations of the court are more disability based than any willful failure to comply as set forth in medical statements provided. Thus, appointment of counsel would appear to have been appropriate throughout the process of the case to avoid a dismissal.

Although no specific finding was made that any cause or the entire complaint was "frivolous," a dismissal with prejudice gives that erroneous impression; which should not have issued in instant case. It also wrongfully provides a court and/or defendant with unfounded cause to obtain a further DISCRIMINATORY restraining order; an apparent constitutional violation based on disability and/or "stigma." There is no basis in fact or law to support a dismissal with prejudice in this case.

Before a District Court may dismiss an in forma pauperis complaint with prejudice, the District Court must find that the plaintiff has engaged in "conscious or intentional acts or omissions." *Harris v Cuyler*, C.A.3 (Pa.) 1981, 664 F2d 388. There are no such findings in instant case. There is insufficient basis in fact or law to support a dismissal with prejudice in this case.

Pro se complaints must be liberally construed and can be dismissed only if face of complaint shows insuperable bar to relief. *Holt v Caspari*, C.A.8 (Mo.) 1992, 961 F2d 1370. There is no showing of "insuperable bar to relief" in this case. Is the U.S. District Court saying that limitation of disability and time to overcome same is such an "insuperable bar to relief?" Or is such a discriminatory due process or other Constitutional violation? There is no basis in fact or law to support a dismissal with prejudice in this case.

Under Section 1915 a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff could prove no set of facts in support of his/her claim which would entitle him/her to relief. *Montana v Commissioner Court*, C.A. 5(Tex) 1981, 659 F2d 19. Here plaintiff has substantial facts and available evidence in support of each cause of action to prove each fact stated in the second amended complaint that would entitle her to

relief. There is no basis in fact or law to support a dismissal with prejudice in this case.

An in forma pauperis complaint can only be dismissed where there is indisputable meritless legal theory or on clear baseless factual contentions. *McClendon v Turner*, W.D. Pa. 1991, 765 F.Supp 251. Instant case presents solid cognizable legal theory and facts in support. There is no basis for dismissal with or without prejudice. There is no basis in fact or law to support a dismissal with prejudice in this case.

Nietzke, 490 U.S. 319 advises that a section 1915 dismissal is only proper if the legal theory or the factual contentions lack an arguable basis indicating that the purpose of the in forma pauperis statute is to ensure equality of consideration for all litigants. Plaintiff in instant case has not been provided with equal consideration for all litigants; having been treated differently by reason of her limitations of disability and "stigma." There is no basis in fact or law to support a dismissal with prejudice in this case.

The general provisions of law under Section 1915 were not afforded to plaintiff. Plaintiff's motion under 59e/60b, was NOT addressed properly as the following was argued:

"Although 28 U.S.C. section 1915 provides for dismissal of an action that is "frivolous," a district court may deem an in forma pauperis complaint **"frivolous" only if it lacks an arguable basis in either law or in fact;** in other words, dismissal is only appropriate for a claim based on an indisputable merit-less legal theory and the frivolousness determination cannot serve as a fact finding process for the resolution of disputed facts." *Fogle v Pierson*, CA10 (Colo.) 2006, 435 F3d 1252, *Milligan v Archuleta*, CA10(Colo.) 2011, 659 F3d 1294. Accordingly, where as in instant case, the Magistrate Judge made no determination on the facts/merits, adopting the recommendation of dismissal with prejudice is error.

A dismissal with prejudice deprives plaintiff of her constitutional right to seek redress from the court, which appears to be a biased Magistrate Judges' intention, not based on fact or law; but improper preconceived opinion, based on extrajudicial sources and/or hostile bias and stigma against persons in plaintiff's protected class; and thus, a constitutional violation.

Were there anything the Court believed was in some way improper, then notice of intent to strike some specific part is available and/or to amend. However, nothing has been specified that would give notice of any defect subject to being stricken.

Attorney practice manuals, such as California Forms of Pleading and Practice and its equivalent Federal pleading forms, regularly repeat essential element language of causes with the different facts inserted. This does NOT make the claims/complaints "frivolous." It only helps practitioners evaluate the facts to insert them appropriately to meet the court's pleading requirements and jury instructions. On information and belief, plaintiff's causes meet both the general form pleading requirements and have the facts necessary to prevail per jury instructions.

Court's are in good faith, generally believed to protect citizens from harm, not give the "green light" to further biased retaliatory abuse and prejudicial harm through "dismissal" of citizen pleas for help; in order to allow the offenders to proceed with the intended abuse and destruction intended toward one who had the courage to "stand up" to the discrimination, false and defamatory representations/media comment, infliction of physical harm and emotional distress, saying "no more!" PLEASE!

Error re Application of "Frivolous" to Dismiss:

As stated above, although 28 U.S.C. section 1915 provides for dismissal of an action that

is “frivolous,” a district court may deem **an in forma pauperis complaint “frivolous” only if it lacks an arguable basis in either law or in fact;** in other words, dismissal is only appropriate for a claim based on an indisputable merit-less legal theory and the frivolousness determination cannot serve as a fact finding process for the resolution of disputed facts. *Fogle v Pierson*, CA10 (Colo.) 2006, 435 F3d 1252, *Milligan v Archuleta*, CA10(Colo.) 2011, 659 F3d 1294. Accordingly, where as in instant case, the Magistrate Judge findings do not present analysis of any fact/law per cause, adopting the recommendation of dismissal is error and an apparent abuse of discretion.

Cornell Law School presents on line its Wex Legal Dictionary in which it defines “frivolous:” *In the legal context, a lawsuit, motion, or appeal that lacks any basis and is intended to harass, delay or embarrass the opposition... Judges are reluctant to find an action frivolous, based on the desire not to discourage people from using the courts to resolve disputes.* It is hoped this Court agrees and does not abide “stigma” or discrimination/retaliation implicating persons with disability as “frivolous.” Fairness, impartiality, due process and equal protection should apply to all “persons” irrespective of “stigma” or disability as the Constitution mandates.

Error re Rendition by Magistrate Judge of Prior Complaint and Amended Complaints.

As stated above, Judicial Notice is hereby requested of each OBJECTION raised to the false and misleading representations of issues regarding Plaintiff’s prior complaints therein. The Magistrate Judge appears not to have read the Objections and ignored the medical good cause NOT to make the findings alleged. No ruling on request for judicial notice issues.

Error/Abuse of Discretion Not to Appoint Counsel or Mention Good Cause Medical

Limitations; e.g. exceptional circumstances.

Sua Sponte Appointment of Counsel for good cause. Plaintiff has requested appointment of counsel in this action with good cause appearing; yet, no such issued. Sua sponte appointment is available under the circumstances in this case and plaintiff's limitations.

The Magistrate Judge appears to have essentially ignored the analysis for appointment of counsel sua sponte and/or upon renewal of prior requests. If an attorney has leave to file a third amended complaint, it is an abuse of discretion to also not give a pro se Plaintiff the right to so amend in the same case! In fact, it is unusual that leave to amend complaint is not granted. THERE IS NOT EVEN THE MENTION OF THE MEDICAL VERIFICATION IN SUPPORT OF LEAVE TO AMEND OR APPOINT COUNSEL, OR EVEN TO AVOID A DISMISSAL FOR MEDICAL CAUSE IN CONTRAVENTION OF THE ALLEGATIONS MADE FOR DISMISSAL! The medical circumstances in this case are exceptional circumstances for appointment of counsel, not for the frustration of the Court; so a dismissal must follow, where no such is even mentioned as having been filed. WHERE IT APPEARS THAT THE MEDICAL EVIDENCE FILED UNDER SEAL WAS NOT CONSIDERED BY THE MAGISTRATE JUDGE, ADOPTING THE FINDINGS IS FUNDAMENTALLY WRONG, ERROR AND A POSSIBLE INADVERTENT ABUSE OF DISCRETION.

Where there is no analysis of the case on the merits of each cause, there is no recognition of good cause not to dismiss by medical impossibility. Any one of the medical conditions or the nexus between permanent progressive disability limitations and difficulties and ability to perform timely within the requirements of the Court; should receive accommodation, NOT dismissal. If

this is confusion, then that too is evidence of the limitations of disability; for which, no Plaintiff should be punished by denial of access to the court to redress serious grievances as set forth in this action. No defendant should "get away with" their misconduct and violation of law because of Plaintiff's medical detriment. Appointment of counsel to resolve any discomfort of the Court is appropriate and application is renewed on request for permission and appeal here."

An issue is the question of whether appointment of counsel should have and should issue in this action and NOT USED AS A DENIAL TO EFFECTUATE A DISMISSAL WITH PREJUDICE!!!

By reason of limited time to mail this appeal for receipt on or before September 18, 2020, plaintiff must incorporate by reference here the issues raised in her motion under 59e/60b. Further, the issue of length and clarity was addressed in Plaintiff's objections to the magistrate judge's findings and recommendations (ECF 80) at pages 23-28 showing the contentions are wrong and themselves, uncertain, vague, ambiguous sans citation to the SAC and which show appearance of bias against persons with disability, who require additional time to accommodate medical limitations; time granted, that should not be held against the requesting party.

Plaintiff has stated a claim sufficient to warrant consideration on appeal for reversal of the dismissal with prejudice, grant of leave to amend and appointment of counsel.

This case presents the Ninth Circuit with an opportunity to tell its lower courts that persons deemed "vexatious litigants" and persons with disabilities, are still entitled to due

process, constitutional protections and the rights and benefits provided under the laws of the United States and its State courts.

It is the right to proceed in forma pauperis on a proper showing pursuant to 28 U.S.C. section 1915, that this court is urged to protect against pre-determined opinion bias of "frivolous" attributed to pro se complaints filed by persons with disability and from the inherent "stigma" attributed to such parties as being "vexatious," precipitating denial of due process and unwarranted dismissals with prejudice. It appears that instant action met the wrongful guillotine of bias and hostile opinion pertaining to plaintiff, rather than any issue of fact or law.

THIS COURTS NEEDS TO ENSURE THAT EFFECTS OF ILLNESS, LIMITATIONS OF DISABILITY AND EXTENSIONS OF TIME TO ACCOMMODATE SAME, DO NOT BECOME THE MEASURE OF DENYING ACCESS TO THE COURT AND DUE PROCESS IN THIS COUNTRY; as occurred for plaintiff in this action.

Plaintiff's physicians have stated that the inability to meet court time and other procedural expectations is not willful; but a problem related to her medical condition and that counsel should be appointed (See Medical Statements under Seal; in particular, Dr. Apperson 8/23/18). The facts showing considerable merit set forth in this case do not warrant denial of leave to amend, a "dismissal with prejudice," an implied determination of "*frivolous*" to prejudice Plaintiff hereafter generally, by res judicata effect and specifically in any future in forma pauperis filing. There is no direct ruling that the SAC is frivolous. Extensions of time that are granted for good cause, should not be construed against the requesting party for dismissal. The failure to appoint counsel, is also NOT a reason to dismiss an action

with prejudice. For all the harm plaintiff has suffered trying to “stand up for justice” in exercise of civil rights under the law, a denial of review would be a painful manifest injustice where the statute of limitations has run, where a dismissal with prejudice issued; which essentially says: the facts showing abuse are warranted and issues raised cannot be re-litigated; thereby, denying constitutional/statutory protections not only for plaintiff; but all similarly situated plaintiffs with “stigma” and/or disability.

Assistance by appointment of counsel for both the process of permission here and appeal is respectfully requested. The application with medical necessity statement attached will be submitted separately to the Court of Appeal.

Your kind consideration is appreciated.

Plaintiff respectfully submits: **The issues in this appeal are substantial and warrant further review and appointment of counsel.”**

REASONS FOR GRANTING THE PETITION

The petition should be granted by this Court to tell its lower courts that a dismissal with prejudice to prevent a pro se plaintiff with disability from refiling his/her case and to deny leave to amend because counsel is NOT appointed, is wrong (See Appendix E(1)page 8, lines24-26 and Appendix F). The magistrate judge’s order (Appendix F) stated: *“Because we find that appointment of counsel is not warranted, we recommend dismissal of this case in a separate order.”* Subsequent alleged reason to dismiss with prejudice are procedural, equally affected by

disability and do not comply with authority under 28 U.S.C. 1915; thus, also appearing to be based in bias against pro se plaintiff's with disability. Thus, this Court should determine it is in contravention of law to deny leave to amend to a pro se plaintiff with disability; where the court states leave to amend will be granted if an able-bodied counsel is appointed. It is a manifest injustice for the court to dismiss with prejudice a case because appointment of counsel is denied.

The reasons alleged for recommendation of dismissal are **ALL RELATED TO LIMITATIONS OF DISABILITY and NOT on lack of fact or authority in support of the merit of any cause of action, an analysis missing in the findings.** Clearly this is a substantial issue that should have been subject to review on appeal by the Ninth Circuit.

The petition is properly granted to avoid erroneous deprivation of constitutional rights, including right of access to the court. This Court should determine that pro se plaintiff's with severe limitations of disability and/or stigma of self representation prejudicing compliance with court processes, receive accommodations appropriate to his/her limitations of disability and/or appointment of counsel to assist in addressing the demands of court processes rather than suffer a dismissal with prejudice to avoid such accommodations/leave to amend and/or to avoid indicia of discriminatory bias.

This Court needs to ensure that effects of acute injury/illness and permanent disability do not become the measure of denying access to the court and due process in this County, as occurred for petitioner in this action. Petitioner's physicians have stated that the inability to meet court time and other expectations (length/clarity) is *not willful*; but a problem related to petitioner's medical condition and that counsel should be appointed (See Appendix B, Medical Verification by M.S. specialist, Dr. Apperson, dated 8/23/18) The failure to appoint

counsel is NOT a reason to dismiss an action with prejudice.

Bias precipitating erroneous reasons for dismissal under one statute in this case (42 U.S.C. 1983) without consideration of whether or NOT the argument is applicable under other statutes (Americans With Disability Act (ADA) P.L. 101-336, 104 Stat. 327 (1990), 42 U.S.C. sec. 12101 et sec.) is wrong and does not comport with the dismissal allegation that the complaint does not state a claim. Just the opposite is true. (See **Objections to Findings and Recommendations** (Appendix E(2) and **Notice of Appeal** (Appendix F, pre-filing argument showing district court error and good faith appeal).

HOW CAN A CLAIM NOT HAVE BEEN STATED WHERE THE COMPLAINT SHOWS THAT PETITIONER SUFFERED REPEATED SUBSTANTIAL MEDICAL HARM AT THE HANDS OF UNRESTRAINED INMATES AND USE OF EXCESSIVE FORCE BY OFFICERS; INCLUDING BUT NOT LIMITED TO: **BROKEN NOSE, SHOULDER INJURY REQUIRING SURGERY, MULTIPLE HEAD TRAUMA/BATTERY INJURIES, SEVERE AMBULATORY PAIN AND FALL INJURIES FROM DENIAL OF PRESCRIBED WHEELCHAIR IN VIOLATION OF THE ADA**; as well as, apparent “frozen arm” stroke and serious aggravation of undiagnosed Multiple Sclerosis. Where is mention of the facts of actionable subversion by officers of petitioner’s legal mail that never arrived at the California Supreme Court? Where is the mention of the repeated retaliatory false infraction allegations in retaliation for complaints related to denial of ADA required mobility devices and access to meals? The disability affected procedural issues should not delete the clear factual merit of the case and right of access to the court to redress these grievances. Denial of leave to amend and dismissal with prejudice is clearly not warranted.

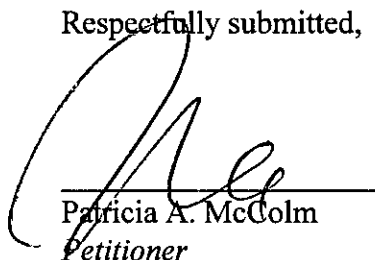
The reasons, facts and authority stated in the above cited Appendix E(2),(F) and (G) arguments are hereby respectfully requested considered herein by reason of limited time and medical capacity to present TWO petitions within the same time period; instant 20-15646 and 20-16817; itself, a questionable decision to overburden petitioner to potentially prejudice consideration before this court of important issues of constitutional interest that must perforce affect all pro se litigants with disability suffering bias/stigma from effects of disability and self-representation.

This case presents this Court with an opportunity to tell lower courts that persons with limitations of disability and stigma as members of an underclass subject to pre-filing orders are still entitled to reasonable accommodations in the processes of the court and are still entitled to constitutional protections due *all* citizens; in order to avoid discrimination and deprivation of rights through erroneous dismissals with prejudice denying access to the courts for redress of good faith grievances.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Patricia A. McColm
Petitioner

Date: July 13, 2021